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Docket No.: _____
United States Court of Appeal For the Ninth Circuit Case No. 04-16200

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

FRED KNOX-Petitioner

v.

JOHN E. POTTER, ET. AL.,-Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether or not the United States Court of Appeal for the Ninth Circuit, by its decision as submitted May 9, 2005, has denied the Petitioner due process of law, as prohibited against by the Fifth Amendment to the Constitution of the United States, the Court of Appeal's May 9, 2005 decision being a decision about an important federal question that has been decided in a way that conflicts with relevant decisions of other Appellate Courts as well as the United States Supreme Court?

/////

LIST OF PARTIES

JOHN E, POTTER, United States Postmaster General, UNITED STATES POSTAL SERVICE, UNITED STATES POSTAL SERVICE'S SAN MATEO INFORMATION SERVICE CENTER, RICH LENA, GUY ONO, VIRGINIA LABSON

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OPINIONS BELOW

The opinion of the United States Court of Appeal, from which the Petitioner petitions this United Supreme Court for a Writ of Certiorari, is included and attached hereto as **APPENDIX A**.

JURISDICTION

This is a Petition for a Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit. The judgment of the Court of Appeal was entered on May 16, 2005. Jurisdiction is invoked under 28 U.S.C.1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment Five of the Constitution of the United States reads in pertinent part, "No person....shall be deprived of life, liberty, or property, without due process of law;...". **Fifth Amendment of the Constitution of the United States.**

"Cases in the courts of appeals may be reviewed by the Supreme Court....., By writ of certiorari granted upon the petition of any party to any civil or criminal case,...". **28 U.S.C. 1254(1).**

/////

STATEMENT OF THE CASE

Proceedings Below

The Petitioner sought EEO counseling with regard to an initial claim of racial discrimination as against the United States Postal Service, the United States Postal Service's San Mateo Information Center, and a number of Postal Service employees, in 1995. The Petitioner filed his first complaint of racial discrimination with the EEO office in November of 1995. The EEO completed its investigation and notified the Petitioner that he had the right to request a hearing. The Petitioner's charges with regard to his first complaint were heard before an Administrative Law Judge on January 9, 1997.

In 1996, and concurrently with consideration of his intitial charge as filed by the Petitioner against the United States Postal Service, the Postal Service's San Mateo Information Center, and named employees, the Petitioner requested of the Equal Employment Opportunity Commission that a subsequent complaint of racial discrimination and retaliation, filed by the Petitioner against named respondents be consolidated with the Petitioner's initial complaint for hearing. Although the Petitioner argued before the Administrative Law Judge that his second complaint was derivative of and directly related to the Petitioner's first complaint, the Judge denied the Petitioner's request for consolidation.

In March of 1998, the Petitioner, a layperson, representing himself In Pro Se, filed a Complaint for Damages as based upon Racial Discrimination and Retaliation in the United States District Court for the Northern District of California, Not later than August of 1998, the Petitioner informed the

United States District Court for the Northern District of California that he also desired that the violation, by the named defendants, of his rights as a Veteran also be considered by the Court

By July of 1999, the Petitioner had filed not less than three separate lawsuits, In Pro Se, in the United States District Court for the Northern District of California as based upon Racial Discrimination, Discrimination because of Disability, and Retaliation, derivative of the Petitioner's initial claims before the United States Equal Employment Opportunity Commission. By the year 2004, the Petitioner had filed at least five law suits in the U.S. District Court as based upon retaliatory acts that had been taken against him by Postal Service employees.

In every case, apart from technical grounds, to include improper service of process, the District Court held that the Petitioner had not established that he had been discriminated against because of his race or sex, that the Petitioner had not established that he had been sexually harassed or subjected to a hostile work environment, and that the Petitioner had not shown any retaliation. The Court also repeatedly held that the Petitioner had failed to file necessary administrative claims, had failed to properly pursue his grievances through his union or seek his union's assistance at all, and that the Petitioner had demonstrated no triable issue.

In all prior cases brought against the Postal Service and other named defendants by the Petitioner since the Petitioner's first EEO charge and subsequent lawsuit, the court has repeatedly decided to overlook the Petitioner's essential claim, that being that every time that the Petitioner filed a claim or charge with the U.S. Equal Employment Opportunity Commission, the Postal Service, by and through

its employees, would take an adverse employment action against him.. The Petitioner's claims, since the submission of Petitioner's first lawsuit, have, as in this case, all had to do with the retaliation that he is subjected to whenever he attempts to assert rights and privileges due him as a Postal Service employee and a Veteran.

Herein, the Petitioner has appealed from the decision of the U.S. District Court of Northern California to the United States Court of Appeal for the Ninth Circuit, wherein, as in the District Court, the doctrine of res judicata has, once again, been wrongfully applied.

Holding of Court of Appeal

On May 9, 2005, reviewing the Petitioner's case de novo, the Court of Appeal for the Ninth Circuit affirmed the decision of the District Court, the Court of Appeal deciding that the defendants had established an identity of claims arising from the same transactional nucleus of facts, that the District Court had properly granted defendants' motion for summary judgment and that the case had been decided on its merits, and, that res judicata barred all of the Petitioner's causes of action between the same parties on the same causes of action. **(APPENDIX A.)**.

The Petitioner argues that he has been denied due process of law by both the United States District Court and by the Court of Appeal.

/////

REASONS FOR GRANTING PETITION

"Cases in the courts of appeals may be reviewed by the Supreme Court...., by writ of certiorari granted upon the petition of any party to any civil or criminal case,...". **28 U.S.C. 1254(1).**

Because of the importance of questions involved, and because of different conclusions by Courts of Appeals, writs of certiorari will be granted. **Shapiro v. United States**, 235 US 412, 59 L.Ed. 291, 35 S.Ct. 122 (1914).

Res Judicata In The Present Case

Res judicata requires that (1) a prior adjudication involves the same claim as the latter suit, (2) the prior adjudication reached a final judgment on the merits, and, (3) the prior adjudication involved the same parties or their privies. **DiLorento v. Downey Unified School Dist. Bd. Of Educ.**, 196 F.3d 958, certiorari denied 120 S.Ct. 1674, 529 U.S. 1067, 146 L.Ed.2d 483 (1999). Res judicata bars all grounds for recovery which could have been asserted, whether they were or not, in the prior lawsuit, if the prior lawsuit concluded in a judgment on the merits. **Sexton v. Chino Valley Independent Fire District**, 7 Fed. Appx 660, certiorari denied 122 S.Ct. 807, 151 L.Ed.2d 693 (2001).

In all prior cases brought against the Postal Service and other named defendants by the Petitioner since the Petitioner's first EEO charge and subsequent lawsuit, the court has repeatedly decided to overlook the Petitioner's essential claim, that being that every time that the Petitioner filed a claim or charge with the U.S. Equal Employment Opportunity Commission, the Postal Service, by and through its employees, would take an adverse employment action

against him. The Petitioner's lawsuits and claims, since the submission of Petitioner's first lawsuit, have, as in this case, all had to do with the retaliation that he is subjected to whenever he attempts to assert rights and privileges due him as a Postal Service employee and a Veteran.

In this case the doctrine of res judicata has, once again, been wrongfully applied.

Because of the retaliation claimed, and because of the nature of the Petitioner's case, prior adjudications have involved most of the same claims as this latter suit, prior adjudications have involved many of the same parties as this latter lawsuit, and, prior final judgment on the merits has been determined only because on May 9, 2005 the Court of Appeal decided an important federal question in a way that conflicts with relevant decisions of other U.S. Courts of Appeal and of the United States Supreme Court.

It has been held that it is the motive for, rather than the character of, the actions taken against an employee that determines whether the claim is one of retaliation. **Heuer v. McLain**, 203 F.3d 1021, 1024 (7th Cir 2000); **Marrero v. Goya of Puerto Rico, Inc.**, 304 F.3d 7, 26 (1st Cir. 2002). Further, it is established that summary judgment may be granted only where there is found no triable issue of fact, and questions of motives and states of mind raise factual issues that preclude summary judgment. ***See*** **Sischo-Nownejad v. Merced Comm. College Dist.**, 934 F.2d 1104, 1111 (1991).

Summary judgment should not have been granted by the District Court in this case as there existed triable issues of fact with regard to the Petitioner's claims of discrimination and retaliation. **Heuer v. McLain**, 203 F.3d 1021, 1024 (7th Cir 2000); **Marrero v. Goya of Puerto Rico, Inc.**, 304 F.3d

7, 26 (1st Cir. 2002); **Sischo-Nownejad v. Merced Comm. College Dist.,** 934 F.2d 1104, 1111 (1991). There could not have been a final judgment on the merits in this case without the District Court's granting, and the Court of Appeal affirmation of the granting, of summary judgment.

Retaliation As Presented In The Present Case

It shall be an unlawful employment practice for an employer to discriminate against an employee because that employee has opposed any practice made an unlawful employment practice by 42 U.S.C.S. 2000e through 2000e-17. (Title VII of the Civil Rights Act of 1964, as amended.), or because that employee has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under 42 U.S.C.S. 2000e through 2000e-17, (Title VII of the Civil Rights Act of 1964.). **42 U.S.C.S. 2000e-3.** An employer's action can be called retaliation for the purposes of Title VII of the Civil Rights Act if the employee is made worse off because of participation in protected activity such as making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under 42 U.S.C.S. 2000e through 2000e-17, (Title VII of the Civil Rights Act of 1964.). **Civil Rights Act of 1964 701, et. seq.; 42 U.S.C.A. 2000e, et. seq.;** **McGuire v. City of Springfield, Ill.**, 280 F.3d 794 (2002).

The purpose of the retaliation provision of 42 U.S.C.S. 2000e, et. seq. is to prevent Title VII claims from being deterred. **Heuer v. Weil-McLain**, 203 F.3d 1021 (2000).

An employer's action can be called retaliation for the purposes of Title VII of the Civil Rights Act if the employee is made worse off because of participation in protected

activity such as making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under 42 U.S.C.S. 2000e through 2000e-17, (Title VII of the Civil Rights Act of 1964.). **Civil Rights Act of 1964 701, et. seq.; 42 U.S.C.A. 2000e, et. seq.;** **McGuire v. City of Springfield, Ill.**, 280 F.3d 794 (2002).

All cases brought by the Petitioner since the Petitioner's first EEO charge and subsequent lawsuit have constituted statements of the facts that every time that the Petitioner filed a claim or charge with the U.S. Equal Employment Opportunity Commission, the Postal Service, by and through its employees, would take an adverse employment action against him and the Petitioner would be made worse off because of his participation in the protected activities of making a charge, testifying, assisting, and participating in an investigation, proceeding, or hearing under Title VII of the Civil Rights Act of 1964. The Petitioner's lawsuits and claims therein have all had to do with the retaliation that the Petitioner has been subjected to whenever he attempts to, or has attempted to, assert rights due him as a Postal Service employee, a Veteran, and a citizen of the United States.

Again, retaliation is the essential claim made by the Petitioner in each of his prior cases. The Petitioner's prior adjudications have by necessity involved most of the same claims as this latter suit. The Petitioner's prior adjudications have by necessity involved many of the same parties. On May 9, 2005, the Court of Appeal, as has been repeatedly done, decided to overlook the Petitioner's essential claim of retaliation, and, made a determination that prior final judgment on the merits had been reached by the District Court, which had also decided to overlook the Petitioner's essential claim of retaliation.

The May 9, 2005 decision of the Court of Appeal conflicts with relevant decisions of the federal courts and of this U.S. Supreme Court.

The Petitioner Has Been Denied Due Process In The Present Case

No person shall be deprived of life, liberty, or property, without due process of law. **Amendment V, Constitution of the United States**. What is due process of law depends upon the circumstances varying with the subject matter and necessities of the situation. **Mover v. Peabody**, 212 U.S. 78, 53 L.Ed. 410, 29 S.Ct. 235 (1909).

It has been held that it is the motive for, rather than the character of, the actions taken against an employee that determines whether the claim is one of retaliation. **Heuer v. McLain**, 203 F.3d 1021, 1024 (7th Cir 2000); **Marrero v. Goya of Puerto Rico, Inc.**, 304 F.3d 7, 26 (1st Cir. 2002). Further, it is established that summary judgment may be granted only where there is found no triable issue of fact, and questions of motives and states of mind raise factual issues that preclude summary judgment. *See* **Sischo-Nownejad v. Merced Comm. College Dist.**, 934 F.2d 1104, 1111 (1991).

Summary judgment should not have been granted by the District Court in this case as there existed triable issues of fact with regard to the Petitioner's claims of discrimination and retaliation. **Heuer v. McLain**, 203 F.3d 1021, 1024 (7th Cir 2000); **Marrero v. Goya of Puerto Rico, Inc.**, 304 F.3d 7, 26 (1st Cir. 2002); **Sischo-Nownejad v. Merced Comm. College Dist.**, 934 F.2d 1104, 1111 (1991). There could not have been a final judgment on the merits in this case without the District Court's granting, and the Court of Appeal affirming the granting, of summary judgment.

Again, prior final judgment on the merits has been determined only because on May 9, 2005 the Court of Appeal decided an important federal question in a way that conflicts with relevant federal court decisions.

It has been long established that due process under the United States Constitution involves the right to a fair and impartial hearing. In observing the Constitutional guarantee of due process, the court must look to the substance of the individual rights to life, liberty, and property involved. Any legal proceeding which regards and preserves the principles of liberty and justice, must be held to due process of law. ***See*** **Amendment 5, Constitution of the United States**; **Hurtado v. California**, 110 U.S. 516 (1884); **Twining v. New Jersey**, 211 U.S. 78 (1908); **Powell v. Alabama**, 287 U.S. 45 (1932); **Palko v. Connecticut**, 302 U.S. 319 (1937); **Snyder v. Massachusetts**, 291 U.S. 97 (1934).

The Petitioner's claims of retaliation were never considered by the lower court in that the Court of Appeal's most immediate attention went to the application of the doctrine of res judicata and the propriety of summary judgment in the present case. **(APPENDIX A)**. Summary judgment should not have been granted by the District Court in this case as there existed triable issues of fact with regard to the Petitioner's claims of discrimination and retaliation. **Heuer v. McLain**, 203 F.3d 1021, 1024 (7th Cir 2000); **Marrero v. Goya of Puerto Rico, Inc.**, 304 F.3d 7, 26 (1st Cir. 2002); **Sischo-Nownejad v. Merced Comm. College Dist.**, 934 F.2d 1104, 1111 (1991). On May 9, 2005, the Court of Appeal, as has been repeatedly done, decided to overlook the Petitioner's essential claim of retaliation, and, made a determination that prior final judgment on the merits had been reached by the District Court, which had also decided to overlook the Petitioner's essential claim of

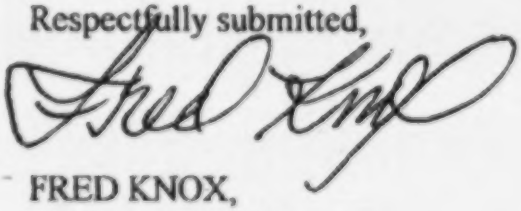
retaliation.

CONCLUSION

The Court of Appeal's May 9, 2005 decision had to do with an important federal question that the Court of Appeal decided in a way that conflicts with relevant decisions of the federal courts. By its May 9, 2005 decision, the Court of Appeal, as had the United States District Court for the Northern District of California, denied the Petitioner due process of law.

Cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari, and for each and all of the reasons stated herein and above, a writ of certiorari must be issued by this United States
Supreme Court
/////

Respectfully submitted,



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OCTOBER TERM, 2004

FRED KNOX-Petitioner

v.

JOHN E. POTTER, ET. AL.,-Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

RETYPED OPINION OF

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED KNOX,

Plaintiff-Appellant

v.

JOHN E. POTTER; Postmaster General, et. al.,

Defendants-Appellees.

_____/

Nos. 0416200

D.C. No. CV-03-03638-MMC

MEMORANDUM*

Appeal from the United States District Court
For the Northern District of California
Maxine M. Chesney. District Judge, Presiding

Submitted May 9, 2005**

Before: PREGERSON, CANBY, and THOMAS, Circuit Judges.

*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Cir. R. 36-3.**

**** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P.**

34(a)(2).

Fred Knox appeals pro se the district court's order granting defendants' motion to dismiss on res judicata grounds his action alleging violations of Title VII, the Veterans Preference Act, 29 U.S.C. 157-58, and various state laws. We have jurisdiction pursuant to 28 U.S.C. 1291. We review de novo, *Western Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997), and we affirm.

Contrary to Knox's contentions, defendants established an identity of claims as Knox's current action arose from the same transactional nucleus of fact as his prior actions. *See Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982) (res judicata bars "all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties... on the same cause of action.") (internal quotations omitted). Moreover, the district court's grant

of summary judgment in favor of defendants in Knox's prior action constituted a final judgment on the merits. ***See Hells Canyon Preservation Council v. U.S. Forest Serv.*****, 403 F.3d 683, 686 (9th Cir. 2005). Accordingly, the district court properly granted defendants' motion to dismiss on res judicata grounds. See Western Radio Servs. Co. 123 F.3d at 1192 (doctrine of res judicata serves to bar a claim where there is an identity of claims, a final judgment on the merits and an identity of parties).**

Knox's remaining contentions lack merit.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRED KNOX,

Plaintiff,

v.

JOHN POTTER, et al.,

Defendants,

/

No. C-03-3638 MMC

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS; VACATING HEARING

(Docket Nos. 5, 10)

Before the Court is the motion to dismiss, filed initially on January 23, 2004 and refiled March 10, 2004, by defendants Postmaster General John Potter ("Postmaster General Potter"), Rich Lena ("Lena"), and Virginia Labson ("Labson"), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[1] No opposition has been filed.[2] Having considered the papers filed in

[1] Defendant Guy Ono ("Ono") has not joined in the motion, and there is no indication in therecord that he has been served.

[2] At the Case Management Conference held April 2, 2004, the Court set the motion for hearing on May 21, 2004. Pursuant to the Civil Local Rules of this District,

A. Knox I

On March 2, 1998,Knox filed suit in the Northern District of California, Case No. 98-0796 CRB ("Knox I"), against defendants Postmaster General Marvin Runyon, USPS Manager Rich Lena ("Lena"), USPS Supervisor Bob Long ("Long"), USPS Personnel Assistant Susy Nakai ("Nakai"), USPS Supervisor Tom Nesbittt ("Nesbitt"), USPS Computer Systens Administrator Dennis Williams ("Williams"), USPS Manager Cele Gutierrez ("Gutierrez'), USPS Supervisor Roger Hisle ("Hisle"), the USPS, USPS employee Charlie Wambeke ("Wambeke"), in his capacity as a representative for American Postal Workers Union AFL-CIO Local 6669 ("the Union"), and Equal Employment Opportunity Commission ("EEOC") Administrative Law Judge

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Knox to be a vexatious litigant. Sections A through E of this background section are taken from that order.

4 Knox I contains both a four-page form employment discrimination complaint and a seventeen-page "Complaint for Damages." All references are to the

Jeanne Player ("ALJ Player"). [4] (See Knox I at 1;7:8-14.)

The caption of the Knox I complaint lists the following causes of action: "Discrimination in Employment; Racial; Retaliation; Unfair Labor Practices; Breach of Contract; Intentional Infliction of Emotional Distress; Negligent Infliction of Emotional Distress; Veterance Preference Denied." (See id at 1.) The gravamen of Knox I is that the USPS and the Union discriminated against Knox on the basis of his race. (See id. at 2:2-4; 2:7-8; 2:25; 3:7-19; 9:19-23; 1:3-7; 12:2-7; 12:24-26; 13:1.) Knox alleges that this discrimination occurred between May 1994 and January 23, 1998. (See Knox I form Employment Discrimination Complaint 7.)

The Knox I complaint contains numerous factual allegations. First, Knox alleges that he was denied promotions and training on the basis of his race. (See

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seventeen-page "Complaint for Damages" unless otherwise noted.

Knox I at 2:7-25; 3:23-26; 4:1-15; 8:19-26; 9:1-17.) Knox further alleges that the defendants colluded and conspired to deny him promotions and training on the basis of his race, (see id. at 9:19-23), and violated 42 U.S.C. 1981, 1985(2), 1986, 2000e and 29 U.S.C. 158(b). (See id. at 9:25-27; 10:1-4.) Throughout the complaint, Knox repeatedly "claims" veterans preference, without further explanation, pursuant to "Veterance Preference Act Pub. L. 103-353, 2(a), Oct 13, 1994, 108 Stat. 3153, 3166 Subchapter II Section 4311. Para (a), (b), (c), (1) (2) And Subchapter III Section 4324 (d), (1), (2)." (See id. at 8:22-24.)

Second, Knox alleges that he was injured in a "Halon Chemical Explosion" on May 31, 1995 and thereafter filed a workers' compensation claim. (See Knox I at 3:1-3.) Knox alleges that USPS Manager Lena was enraged by Knox's claim and called Knox a "[s]illy [n]igger." (See id. at 3:7-9.) Knox further alleges that USPS Supervisor

Long and Manager Lena read Knox' wokers' compensation claim aloud to his co-workers and thereby created a hostile work environment because Knox, inter alia, was stalked at work by unidentified persons, was followed home by unidentified persons, unidentified co-workers used a machine to blow dust in his face, and his property was vandalized by unidentified persons. (See id. at 3:9-19.)

Third, Knox alleges that following the Halon explosion, USPS Manager Gutierrez ordered Knox to attend three separate medical examinations and instructed the physicians to examine Knox's genital area. (See id. at 4:17--26; 5:1-19.) Knox then states without further explanation, that he "charged Manager Cele Gutierrez with Sex Harassment, Retaliation, and Personal Discrimination and abusive authority." (See id. at 5:17-19.)

Fourth, Knox alleges that he was denied higher pay

while performing higher level duties than he was required to perform. (See id. at 4:9-11; 5:26; 6:1; 8:14-17.) He also alleges that he was denied overtime work that was instead given to female employees because they had "high mortgages to pay." (See id. at 5:26; 6:1-4.)

Fifth, Knox alleges that he was forced to work in unsafe working conditions. (See id. at 6:14-17, 19-22.)

Sixth, Knox alleges defendants failed to investigate his disparate treatment claims (see id. at 10:19-21), that he was subjected to systematic harassment at work, (see id. at 10:23-26), and that he was retaliated against on the basis of his race and because he complained about his treatment as a black employee. (See id. at 10:23-26; 11:1-17.) Knox again alleges that these actions were in violation of 42 U.S.C. 1981, 1985(2), 1986, 2000e and 29 U.S.C. 158(b). (See id. at 11:18-20.)

Seventh, Knox alleges that the Union inadequately represented him while pursuing his "employment-related grievances" because of his race. (See id. at 12:2-7.) He also alleges that the Union and Wambeke "committed unfair labor practices as prohibited against by 29 U.S.C. 158(b)." (See Knox I at 12:9-11.)

Eighth, Knox alleges that the defendants "conspired and colluded to violate the plaintiff [sic] civil rights and to violate the federal laws breaching all covenants, expressed or implied, of good faith and fair dealing [between Knox, the USPS and the Union]." (See id. at 12:18-26; 13:1-5.)

Ninth, Knox alleges that the defendants actions have caused him severe emotional distress and physical injury. (See id. at 13:11-28.)

Finally, Knox alleges that ALJ Player, who presided over a trial on unspecified discrimination charges Knox filed against unspecified defendants, was "a bias [sic]

judge, she denied the plaintiff subpoena records pertaining to the discrimination charges, she split the case up into 2 cases, she denied the plaintiff witnesses, she denied the plaintiff to have the union representative to testify as a witness, and ... allowed the defendants to enter all evidence, records and witnesses in favor of the defendants." (See id. at 14:3-12.)

Knox also makes an allegation in his form employment discrimination complaint that is not made in his complaint for damages. Knox alleges that USPS Supervisor Hisle threatened to fire him if he did not withdraw his EEOC claims. (See Knox I form Employment Discrimination Complaint at 4(d).)

On July 1, 1998, United States District Judge Charles R. Breyer dismissed with prejudice plaintiff's claims against the EEOC and ALJ Player, (See Order Dismissing ALJ Player and the EEOC, Case No. 98-0796 CRB, at 2:25-28 and 3:1-23, filed Jul. 1, 1998.)

Judge Breyer found: (1) Congress did nor create an express or implied cause of action against the EEOC by employees of third parties, (2) plaintiff alleges no facts to support his 42 U.S.C. 1981, 1985(2) and 1986 claims, and moreover, these charges were not properly brought against the EEOC and ALJ Player, and (3) plaintiff failed to allege any facts to support his 29 U.S.C. 158(b) claim against either the EEOC or ALJ Player. (See id.)

After the case was reassigned to Magistrate Judge James Larson, Judge Larson dismissed the American Postal Workers Union ("National"), Local 6669 ("Local", and Wambeke (collectively "Union defendants"). In an order dated April 19, 1999, Judge Larson found that Knox failed to exhaust his administrative remedies as to these defendants. (See Order Granting Union Defs.' Mtn. To Dismiss, Case No. 98-0796 JL, at 4:1-10, filed Apr. 19, 1999.) Judge Larson also found: (1) Knox failed

to properly serve National, (2) Wambeke could not be sued individually under Title VII, (3) judgment could not be had against Wambeke as an individual for breach of the duty of fair representation, (4) Knox failed to demonstrate that the Union engaged in arbitrary, discriminatory or bad faith conduct, (5) Knox failed to establish the Union's intent to discriminate (as part of his section 1981 claim), (6) Knox failed to state a claim under section 1985(2) because he was not a party, witness, or juror to any matter pending in federal court at the time he filed the complaint, and (7) his 1986 claim therefore also failed. (See id. 4:12-28; 5; 6; 7.) Accordingly, Judge Larson dimissed these defendants both on procedural grounds and on the merits. Knox's remaining claims in the action were ultimately related to claims pending in a subsequently-filed Knox action as described below.

B. Knox II

On March 30, 1999, Knox filed a second lawsuit in the Northern District of California, Case No. 99-1527 SBA ("Knox II"), against all defendants named in Knox I, with the exception of ALJ Player, and added a new defendant, Knox's USPS co-worker Fred Alarva ("Alarva").[5] (See Knox II at 1.) The caption of the Knox II complaint lists the following causes of action: "Discrimination in Employment, Racial; Retaliation; Unfair Labor Practices; Assault; Battery; Interference With Contract; Intentional Infliction of Emotional Distress; Hiring Co-Workers to Harass, Retaliate and Stalk the Plaintiff." (See id.) Assault, battery, interference with contract, and hiring personnel to harass Knox were not previously asserted as causes of action in Knox I.

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[5] Knox II contains both a three-page from employment discrimination complaint and a thirteen-page "Complaint for Damages." All references are to the thirteen-page "Complaint for Damages" unless otherwise noted.

The gravamen of Knox II is, again, that the USPS and the Union discriminated against Knox on the basis of his race. (See id. at 2:1-4; 6:10-12; 6:20-24; 7:9-27; 8:1-28 and 9:1-4.) Knox alleges this discrimination occurred from September 20, 1996 to May 15, 1998, a time period that overlaps in part with then allegations of Knox I. (See Knox II form Employment Discrimination Complaint 7.)

Knox explicitly recognizes that the Knox II complaint is duplicative of the Knox I complaint. Knox states that Knox II is related to Knox I because "this case involves substantially the same parties, transactions, events and questions of law as are involved in ...[Knox I] in that there will be an unduly burdensome duplication of labor and expense and the possibility of conflicting results if the cases [sic] conducted before different judges." (See Knox II at 2:7-12.)

The Knox II complaint likewise contains numerous

factual allegations, many of which are identical to claims asserted in Knox I. Knox again alleges that he has been forced to work in unsafe conditions. (See id. at 2:19-28; 20:1-18.) He also alleges that USPS Supervisor Hisle retaliated against Knox and threatened to fire him if he did not withdraw his employment discrimination complaints. (See id. at 6:1-12.) Knox also realleges that he has been stalked on the job, both by unspecified co-workers, (see id. at 9:23-26), and by co-worker Alarva, (see id. at 7:2-7), and that his property has been vandalized by unspecified persons. (See id. at 9:26; 10:1-4.) He also realleges that the defendants have intentionally and negligently caused him emotional distress. (See id. at 11:3-19.) He further realleges that all defendants acted because of his race in violation of 42 U.S.C. 1981, 1985(2), 1986 and 2000(e), and in violation of his rights as a veteran. (See id. at 8:10-20.)

Knox II does contain a few new allegations, although

many of these allegations are based on claims asserted in Knox I. First, Knox alleges that his USPS co-worker Alarva used a machine to blow dust in his face.[6] (See id. at 6:14-17). He further alleges that Alarva "committed an assault and battery upon the plaintiff," (see id. at 6:19-24) and stalked him. (See id. at 7:27.) Knox alleges Alarva's actions were intendeds to intimidate him so that he would withdraw his discrimination complaints.[7] (See id. at 7:12-14.) Second, Knox alleges that USPS Supervisor Hisle harassed and threatened to fire him because of his race.[8] (See id. at 7:16-27.) Third, he alleges USPS Supervisor Hisle and USPS co-worker Alarva colluded and conspired with Union representative Wambeke and the Union to

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[6] In Knox I, Knox alleges that an unspecified USPS co-worker used a machine to blow dust in his face. (See Knox I at 3:9-19.)

[7] In Knox I, Knox alleges that unspecified USPS co-workers retaliated against him for filing a workers' compensation claim. (See Knox I Compl. at 3:9-19.)

interfere with his rights in violation of 29 U.S.C. 157 and 158(b).[9] (See id. at 9:9-15.) Finally, Knox alleges that all named defendants acted with the intent to interfere with Knox's contracts with the USPS and the Union, by causing the USPS to fail to train and promote him and by causing the Union's failure to represent him.[10] (See id. at 10:16-23.) Knox's claims in this action were ultimately related to claims pending in a subsequently-filed Knox action as described below.

C. Knox III

On October 21, 1999, Knox filed his third complaint in the Northern District of California, Case No. 99-4675 MJJ ("Knox III"), against defendants Postmaster General William J. Henderson ("Postmaster Henderson"), the USPS San Mateo Information Center ("USPSSMIC"),

[9] In Knox I, Knox alleges USPS Supervisor Hisle threatened to fire him if he did not withdraw his EEOC claims. (See Knox I form Employment Discrimination Complaint 4(d).)

[9] In Knox I, Knox alleges that Wambeke and the

and Knox's USPS co-worker Vic Caparros ("Caparros"). (See Knox III at 1.) The caption of the Knox III complaint lists causes of action for: "Racial Discrimination and Retaliation in Employment; Intentional Infliction of Emotional Distress; Negligent Infliction of Emotional Distress." (See id. at 1.) The gravamen of Knox III, again, is that USPS discriminated against Knox in his employment and that Knox was threatened, intimidated, harassed, and retaliates against for filing prior lawsuits alleging the defendants violated his rights. (See Knox III at 3:2-24; 4:13-28.) Knox does not specify, however, when these acts occurred.

In the Knox III complaint, Knox repeats many of the same allegations found in Knox I and Knox II. Knox alleges that the "direct result" of filing his other civil

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Union inadequately represented him because of his race and committed unfair labor practices prohibited by 28 U.S.C. 158(b). (See Knox I Compl. at 12:2-11.)

10 In Knox I, Knox alleges that the USPS failed to train and promote him because of his race (see Knox I

actions is that Postmaster Henderson and the USPSSMIC "have started and maintain an ongoing and continuing policy and practice of disparate treatment in employment with regard to the plaintiff, and have acted in conspiracy with coworkers of the plaintiff to intimidate and harass the plaintiff in his employment, thereby creating a hostile work environment for the plaintiff." (See id. at 3:2-8; see also id. at 4:20-24.) He further alleges that the defendants colluded and conspired with other unspecified co-workers to do so. (See id. at 3:10-17.) Knox alleges that the defendants acted in violation of Title VII and 42 U.S.C. 1985(2) and 1986. (See id. at 4:26-28.) Finally, Knox alleges defendants intentionally and negligently caused him emotional distress (See id. at 5:11-22; 6:1-12.)

The Knox III complaint does contain a few allegations not specifically asserted in the prior two

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Compl. At 2:7-25), and the Union failed to adequately represent him because of his race. (See is. at 12:2-7.)

Knox actions. These allegations, however, are related to allegations raised in both Knox I and Knox II. First, Knox alleges that Postmaster Henderson and the USPSSMIC "colluded and conspired with the defendant Caparros, a coworker of the plaintiff's, to subject the plaintiff to ongoing and continuous intimidation and harassment in his employment, and in plaintiff's attempts to seek legal redress for the violation of his civil rights. "(See id. at 3:20-24.) The only new allegations is that co-worker Capparros, in particular, as to opposed Knox's previously unspecified co-workers, allegedly conspired and colluded with the USPS to intimidate and harass Knox. He further specifically alleges that on January 5, 1999, Caparros, in furtherance of the conspiracy with the other named Knox III defendants, yelled at him, "creating a hostile working environment." (See id. at 3:27-28; 4:1-3.) Knox also alleges that on March 16, 1999, Caparros

threatened to spill hot coffee on him and that this threat and other unspecified intimidation and harassment created a hostile work environment. (See id. at 4:6-18.) Knox alleges these actions were in retaliation for his filing of other lawsuits. (See id.) These incidents occurred before the filing of Knox II, and could have been alleged in Knox II, but Knox instead chose to file an entirely separate complaint asserting the same pattern or practice of discrimination alleged in Knox I and Knox II. These claims were ultimately related to Knox's claims in Knox I and Knox II, as discussed below.

D. Knox I, II, III

On January 27, 2000, Judge Larson issued an order relating Knox I, Knox II, and Knox III. (See Related Case Order, Case Nos. 98-0796 JL, 99-1527 JL, 99-4675 JL, filed Jan. 27, 2000.) On October 6, 2000, Judge Larson granted summary judgment in favor of all

defendants on all causes of action an dismissed all three cases. (See Order Granting Summary Judgment, Dismissing All Claims Against All Defs., Case Nos. 98-0796 JL, 99-1527 JL, 99-4675 JL, at 13:12-13, filed Oct. 6, 2000.)

Judge Larson granted summary judgment on the following grounds. First he found that none of the defendants had been personally served. (See id. at 3:22-25; 4:1-10.) He also found that the Postmaster General is the only proper defendant in a USPS employee's Title VII action alleging employment discrimination. (See id. at 6:7-13.) He found, moreover, that Title VII is the exclusive remedy for claims of discrimination in federal employment, and that Knox's claims under 42 U.S.C. 1981, 1985, 1986, 2000e, 29 U.S.C. 158, as well as Knox's contract, tort and veteran claims, were thus pre-empted by Title VII. (See id. at 6:18-25; 7:1-3.) Judge Larson noted that some of

Knox's claims could sound in tort if they were not based on his discrimination claims. (See id. at 7:4-7.) Judge Larson further found, however, that Knox did not exhaust his administrative remedies under the Federal Tort Claims Act, 28 U.S.C. 2671 et. seq., and accordingly, Found these claims should be dismissed as well. (See id. at 7:7-20.)

Judge Larson next analyzed each of Knox's claims on the assumption, arguendo, that the defendants had been properly served. Judge Larson found: (1) the position to which Knox claims he should have been promoted was eliminated before he applied, (see id. at 9:8-16); (2) one racial epithet was not enough to establish a hostile work environment has, (see id. at 9:18-27); (3) Knox failed to allege that his dangerous working conditions were related to his race, and consequently, these claims presented a "workers compensation or occupational safety issue," (see Order

Granting Summary Judgment, Dismissing All Claims Against All Defs., Case Nos. 98-0796 JL, 99-1527 JL, 99-4675 JL, at 10;1-4, filed Oct. 6, 2000); (4) Knox actually received veterans benefits benefits he claimed not to have received, (see id. at 10:16); (5) Knox did not file a grievance alleging a breach of the duty of representation and this claim thus was time-barred. (see id. at 12:5-11); and that Knox failed to offer any evidence to support:

(a) that he was threatened with, and subjected to violent acts, (see id. at 10:7-8);

(b) that he ever applied for training, (see id. at 10:18-19);

(c) that the USPS examining physician examined his genital area, or that such an examination was not part of a normal physical, or that his supervisor had any knowledge of or ability to influence the physical examination, (see id. At 10:21-26);

(d) that the union ignored or conspired to ignore his complaints, (see id. at 11:3-4);

(e) that defendants threatened to fire him if he did not withdraw his EEOC complaints, (see id. at 11:5-6);

(f) that he exhausted his administrative appeals regarding the union's alleged failure to grieve his complaint against his employer, (see id. at 11:28; 12:1-2);

(g) a prima facie case of 42 U.S.C. 1981 and 1985 violations, (see id. at 12:2-4);

(h) that the union failed to investigate or take appropriate action on his claims or that the union engaged in arbitrary, discriminatory, or bad faith conduct (see id. at 12:12-18.)

Accordingly, Judge Larson granted summary judgment in favor of the defendants.

The Ninth Circuit affirmed Judge Larson decision on December 27, 2001. Knox v. Henderson, Nos. 00-

17245, 00-17253, 00-17287, 2001 WL 1664392 (9th Cir. Dec. 27, 2001). The Ninth Circuit found that (1) no cause action existed against individual postal employees for violations of Title VII, (2) Knox failed to timely serve defendant Postmaster and did not show good cause for his failure to do so, (3) Judge Larson properly dismissed Knox's 42 U.S.C. 1981, 1985, 1985, 1986 and 29 U.S.C. 158 claims because Title VII is the exclusive remedy for federal employment discrimination claims, (4) the Union defendants were properly dismissed because Knox failed to exhaust his administrative remedies, (5) Knox failed to present evidence of any 42 U.S.C. 1985 violation and consequently his 42 U.S.C. 1986 claim also failed, (6) Knox failed to present evidence supporting a claim for breach of the duty of fair representation, (7) the EEOC and ALJ Player were properly dismissed for failure to state a claim, (8) Judge Larson did not abuse his

discretion when he denied plaintiff's discovery requests, and (9) plaintiff's other contentions lacked merit, See id. at *1. The Supreme Court denied certiorari, see Knox v. Potter, 537 U.S. 887 (2002), and denied rehearing. See Knox v. Potter, 537 U.S. 1068 (2002).

E. Knox IV

On January 16, 2003, Knox filed his fourth complaint, Case No. 03-0229 MMC ("Knox IV") against previously named defendants Lena, Wambeke, Gutierrez, Alarva, and ALJ Player.[11] (See Knox IV at 1.) Postmaster General John Potter ("Postmaster Potter"), USPS Manager Guy Ono ("Ono") and USPS Manager Virginia Labson ("Labson") are also named as defendants. (See id.) The caption of the Knox IV complaint lists causes of action for: "Racial

[11] Knox IV contains both a three-page from employment discrimination complaint and a sixteen-page "Complaint for Damages." All references are to the sixteen-page "Complaint for Damages" unless otherwise noted.

Discrimination; Sexual Discrimination; Retaliation; Unfair Labor Practices; Breach of Contract; Denial of Veterans Preference and Title 38 Rights; Intentional Infliction of Emotional Distress, Harassment; Property Damaged; Long Term Reoccur Halon Sickness; Sex Harassment." (See id.) The gravamen of Knox IV is again that Knox was discriminated against in his employment on the basis of his race. (See Knox IV at 5:6-25; 7:1-3, 8:11-13; 9:5-11; 10:12-18; 13:3-17.) Knox alleges that this discrimination occurred from May of 1995 "to Present."[12]

In the Knox IV complaint, Knox alleges claims nearly identical to those that he previously alleged in his three previous complaints. Knox again alleges that (1) he was injured in a Halon Explosion in 1995. (see Knox IV at 3:16-19), (2) that his supervisors requested that his genital area be examined during a medical evaluation

[12] The Court construes "Present" as January 16, 2003, the date Knox IV was filed. (See Knox IV from Employment Discrimination Complaint 7.)

following the explosion, (see id. at 4:19-23), (3) that he was denied higher pay while performing higher level duties than he was required to perform, (see id. at 6:9-14), (4) that he was denied training opportunities and promotions because of his race, (see id. at 6:16-28; 7:1-3), (5) that the defendants failed to investigate his complaints, (see id. at 7:17-26), (5) that the defendants failed to investigate his complaints, (see id. at 7:17-26), (6) that the defendants directly and systematically harassed him and that they have done so because of his race, (see id. at 7:28 and 8:1-2), (7) that his EEOC complaints were not adequately investigated because of his race, (see id. at 8:4-13), (8) that the defendants conspired and colluded to breach all covenants of good faith and fair dealing by denying him training, promotions, and pursuit of his grievance because of his race, (see id. at 9:28; 10:1-18), (9) that all of defendants' actions violated "the Veterans Preference

Act," (see id. at 10:25-28; 11:1-17), (10) that the defendants actions caused him emotional distress, (see id. at 11:24-27), (11) that Alarva stalked him on the job, used a machine to blow dust in his face, and that Alarva did this because of Knox's race and in retaliation for Knox filing EEOC and civil actions against him, (see id. at 13:3-19), (12) that Lena read Knox's workers' compensation claim to his co-workers and he was thereafter subjected to retaliation, (see id. at 13:27-28; 14:1), and (13) that he has been forced to work in unsafe working conditions, (see id. at 3;21-26; 5:12-16; 14:8-28).

Knox again that all of the defendants' actions were in violation of Title VII, 42 U.S.C. 1981,1985(2), 1986, 2000e, and 29 U.S.C. 157,158(b). (See id at 2:6-10; 8:27-28 and 9:1-3.)

On August 22, 2003, Judge Larson recommended that the Knox IV defendants' motions to dismiss be

granted on res judicata grounds. (see Referral for Reassignment with Recommendation of Dismissal with Prejudice, ("Referral"), Case No. 03-0229 JL, at 9:21-23, filed Aug. 22, 2003.) [13] Judge Larson also recommended that an order be issued, requiring Knox to show cause "why Plaintiff should not be declared a vexatious litigant and his future pleadings be subjected to pre-filing review." (See id. at 9:26-28; 10:1-2.) By Order dated October 21, 2003, the Court adopted Judge Larson's recommendations in full. In particular, the Court dismissed the action with prejudice and issued an order to show cause. Thereafter, on December 22, 2003, the Court issued an order declaring Knox to be a vexatious litigant and precluding Knox from filing, without prior permission from the Court, any future complaints regarding his employment with the USPS from May 1994 to January 16, 2003.

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[13] The action was reassigned to the undersigned on August 25, 2003

(See Order Declaring Plaintiff Fred Knox a Vexatious Litigant Imposing Pre-Filing Restrictions, Case No. 03-0229 MMC.)

F. Case No. 03-3638, "Knox V"

On August 4, 2003, Knox filed the instant action in the Northern District of California, Case No. 03-3638 ("Knox V"), against Postmaster General Potter, Lena, Labson, and Ono. (See Knox V at 1.)[14] The case was assigned to Judge Larson. On February 25, 2004, the Court issued an order relating Knox V to Knox IV, and as a result, the action was reassigned to this Court. (See Related Case Order, filed Feb. 25, 2004.)

Knox alleges his claims arise from defendants' failure to promote him, harassment, retaliation, denial of veteran's benefits, breach of contract, and intentional

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[14] Knox V contains both a three-page form employment discrimination complaint and an eleven-page "Complaint for Damages." All references are to the eleven-page "Complaint for Damages" unless otherwise noted.

infliction of emotional distress. (See Knox V form Employment Discrimination Complaint 4.) Knox alleges defendants discrimination against him because of his race, sex, age and participation in collective bargaining activities. (See id. 5.) Initially, Knox states that the alleged discrimination occurred on or about October 2002. (See id. 7.) As noted below, however, Knox subsequently states that the alleged acts began in May and December of 1995. (See Knox V at 3:8, 21-22.)

In his first cause of action, "Retaliation", Knox reasserts several familiar allegations. First, Knox alleges he was injured in a Halon explosion, and, as a result, that he has suffered physical and emotional injury since May 1995. (See id. at 3:8-12.) Knox also alleges that his requests for training and promotion have been denied since December 1995. (See id. at 3:21-24.) Knox states he has filed four discrimination complaints, and that defendants failed and refused to correct the

discrimination alleged therein. (See id. at 3:26-4:15.) According to Knox defendants have continually harassed Knox and conspired to subject Knox to disparate treatment on the job. (See id. at 4:7-15.) Knox claims defendants have done so because of his race, sex, and age, and because Knox filed grievances with his union. (See id. at 4:17-27.) Knox alleges these actions violate Title VII of the Civil Rights Act of 1964, the Veterans Preference Act, and 29 U.S.C. 158(a)(4). (See Knox V at 5:3-12.)

In his second cause of action, "Unfair Labor Practices," Knox alleges that defendants failed to correct the discrimination he previously complained about, continuously harassed him, and conspired to subject him to disparate treatment on the job because of race , sex, and age, and because he filed grievances with the union. (See id. At 5:19-27; 6:1-24.) Knox argues these actions violate 29 U.S.C. 157 and

158(a)(4). (See id. at 6:15, 23.)

In his third cause of action, "Breach of Contract," Knox alleges contracts existed between Knox and defendants, which included covenants that Knox would be treated equally with respect to similarly situated USPS employee regarding job training, job promotion, employee discipline, and the pursuit of job-related grievances. (See id. at 7:4-10.) Knox claims defendants colluded and conspired to breach these contracts and covenants because of his race, sex, and age, and because Knox filed grievances with his union. (See id. at 7:12-27; 8:1-19.)

In his fourth cause of action, "Denial of Veterans Preference," Knox alleges he has been denied training and promotion since December 1995. (See id. at 8:27; 9:1-2.) He alleges the defendants' actions violated 29 U.S.C. 157 and "Title 38, U.S.C., regarding the Veterans Benefits and Veterans Rehabilitation Act."

(See id. at 9:14-15; 10:1-2.)

In his fifth cause of action, "Intentional Infliction of Emotional Distress," Knox alleges that defendants' actions and failures to act were extreme, outrageous, and beyond the bounds of reasonable conduct. (See id. at 10:10-16.) According to Knox, defendants acted with the intent to cause Knox "severe and extreme physical injury and emotional distress, in fact causing plaintiff severe and extreme physical injury and emotional distress and damages." (See id. at 10:13-16.)

In his sixth cause of action, "Negligent Infliction of Emotional Distress," Knox alleges that defendants acted with reckless disregard for the physical and emotional safety of Knox, causing Knox extreme and severe physical injury, emotional harm, and damages. (See Knox V at 10:23-27; 11:1-2.)

DISCUSSION

A. Pre-Filing Restrictions

At the outset, defendants suggest that the Court issue an order to show cause why the complaint should not be dismissed pursuant to this Court's December 22, 2003 order declaring Knox to be a vexatious litigant. In that order, the Court precluded Knox from filing, without prior permission from the Court, any future complaints regarding his employment with the USPS from May 1994 to January 16, 2003. The pre-filing restriction thus applies only to complaints filed after December 22, 2003. See Moy v. United States, 906 F.2d 467, 469 (9th Cir. 1990) (approving order prohibiting pro se plaintiff from filing future complaints against certain specified defendants without prior approval of district court). Knox filed the present action on August 4, 2003, before the Court declared Knox to be a vexatious litigant. Consequently, the pre-filing restriction does not apply to the instant action.

B. Res Judicata

Defendants next argue that Knox's complaint is barred by the doctrine of res judicata. "Res Judicata, also known as claim preclusion, bare litigation in a subsequent action of any claims that were raised or could have been raised in the prior action. "Western Radio Servs. Co. v. Glickman, 123 F3d 1189,1192 (9th Cir. 1997). Res judicata applies whenever there is "(1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between the parties. "See id.

1. Identity of Claims

First, there must be an identity of claims between those raised in the instant action and those raised in the previously adjudicated Knox I, Knox II, Knox III, and/or Knox IV. "The central criterion in determining whether there is an identity of claims between the first and second adjudications is 'whether the two suits arise out of the same transactional nucleus of facts.'" Frank v. United Airlines, Inc., 216 F3d 845, 851 (9th Cir. 2000)

(citation omitted). Defendants argue that Knox V relies on the same nucleus of operative facts as in his previous cases and asserts virtually the same claims as those previously adjudicated in Knox I, Knox II, Knox III, and Knox IV.

In Knox V, Knox asserts causes of action for discrimination on the basis of race, sex, and age; retaliation; unfair labor practices; breach of contract; violations of the Veterans Preference Act; intentional infliction of emotional distress; and negligent infliction of emotional distress. (See Knox V form Employment Discrimination Complaint 4,5.) These causes of action were raised in previous Knox cases. Knox's causes of action for discrimination on the basis of race and retaliation were previously raised in Knox I, Knox II, Knox III, and Knox IV. (See Knox I at 2:2-4; 2:7-8; 2:25; 3:7-19; 9:19-23; 11:3-7; 12:2-7; 12:24-26 and 13:1; Knox II at 2:1-4; 6:10-12; 6:20-24; 7:9-27; 8:1-28 and

9:1-4; Knox III at 3:2-24; 4:13-28; Knox IV at 5:6-25; 7:1-3, 8:11-13, 9:5-11; 10:12-18; 13:3-17.) Knox's cause of action for discrimination on the basis of sex was raised in Knox I, Knox II, and Knox IV. (See Knox I at 5:17-19 5:26 and 6:1-4; Knox II at 6:1-27; 7:1-27; Knox IV at 4:19-23.) Knox's causes of action for unfair labor practices, breach of contract, and violations of the Veteran's Preference Act were raised in Knox I, II, and IV. (See Knox I at 8:22-24; Knox II at 8:10-20; Knox IV at 10:25-28 and 11:1-17.) Knox's claims for infliction of emotional distress were raised in Knox I, Knox II, Knox III, and Knox IV. (See Knox I at 13:11-26; Knox II at 11:3-19; Knox III at 5:11-22; 6:1-12; Knox IV at 11:24-27.)

The Knox V claims rely on virtually the same set of operative facts as alleged in the previous cases. First, as noted, Knox alleges that the discrimination detailed in Knox V occurred from May 1995 to approximately

October 2002. (See Knox V form Employment Discrimination Complaint 7.) This period overlaps in full with the periods at issue in Knox I, Knox II, Knox III, and Knox IV.[15] Second, Knox's instant claims do not allege any unlawful acts by the defendants that were not raised in his previous complaints.

Specifically, the Knox V complaint alleges: (1) Knox was injured in a May 1995 Halon explosion, (see id. at 3:8-11); (2) defendants have harassed Knox from May 1995 to October 2002 because of his race, sex, age, and complaint to the local union, (see id. at 4:16-27; 5:19-27; 9:4-24); (3) defendants have discriminated against Knox from May 1995 to October 2002 because of his race, sex, age and complaint to the local union, (see id. at 4:7-15; 6:5-27; 9:4-24); (4) defendants

[15] In Knox I, Knox alleges discrimination between May 1994 and January 23, 1998. (See Knox I form Employment Discrimination Complaint 7.) In Knox II, Knox alleges he was discriminated against between September 20, 1996 and May 15, 1998. (See Knox II Form Employment Discrimination Complaint 7.) In

retaliated against Knox, (see id. at 6:22-23); (5) Knox's request for training from 1995 to October 2002 have been denied because of his race, sex, age, and complaint to the local union, (see id. at 3:21-27); (6) Knox's requests for promotion from 1995 to October 2002 have been denied because of his race, sex, age, and complaint to the local union, (see id. at 3:21-27); (7) defendants failed and refused to investigate Knox's discrimination claims because of his race, sex, age, and complaint to the local union, (see id. at 4:7-27; 5:19-27); (8) defendants colluded and conspired to breach all covenants of good faith and fair dealing regarding Knox's equal treatment because of plaintiff's race, sex, age, and complaint to local, (see id. at 7:4-27; 8:1-20; 9:16-24); (9) all acts alleged violated the "Veterans

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Knox III, Knox does not include a time period during which he suffered discrimination, but does allege at least two acts of discrimination occurring in 1999. (See Knox III, 3:27-28 and 4:1-3; 4:6-18.) Finally, in Knox IV, Knox alleges discrimination between May 1995 and January 16, 2003. (See Knox IV form Employment

Preference Act," (see id. at 9:26-27; 10:1-2); and (10) Defendants actions or failures to act resulted in Knox's emotional distress, (see id. at 10:10-27; 11:1-2).

Knox alleged all of the foregoing claims in previous suits, with the exception of defendants' alleged actions based on age. The above-described first, second, fourth, fifth, sixth, eighth, and tenth allegations were previously alleged in Knox I, Knox II, and Knox IV. The third and ninth allegations were alleged in Knox I, Knox II, Knox III, and Knox IV. The seventh allegations was included in Knox I and Knox IV.

Although Knox did not specifically raise age-based harassment or discrimination in any of his prior lawsuits, because Knox relies on the same nucleus of operative facts in support of his claims of age discrimination, he was obligated to bring the age discrimination claim at the same time he brought his race and gender

Discrimination Complaint 7.)

discrimination claims. See Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466 n.4 (1982) (holding petitioner obligated to bring national origin discrimination claim at same time as religious discrimination claim).

In short, the claims asserted in Knox V have either been asserted in Knox I, Knox II, Knox III, and/or Knox IV or rely on the same nucleus of operative facts. (See Frank, 216 F3d at 851. Accordingly, there exists an identity of all claims raised in Knox V and those previously adjudicated in Knox I, Knox II, Knox III, and Knox IV. See id.

2. Final Judgment on the Merits

For the doctrine res judicata to apply here, a final judgment on the merits must have been rendered in the previous cases. A final judgment is generally "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." See Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978). A

judgment on the merits is "based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or form." See Harper Plastics, Inc. v. Amoco Chem. Corp., 657 F.2d 939, 943 (9th Cir. 1981). A judgment dismissing a claim with prejudice is a final judgment on the merits. See Classic Auto Refinishing, Inc. v. Marino, 181 F.3d 1142, 1144 (9th Cir. 1999).

As noted, Judge Larson granted summary judgment in favor of all defendants on the merits of all causes of action in Knox I, Knox II, and Knox III. (See Order Granting Summary Judgment, Dismissing All Claims Against All Defs., Case Nos. 98-0796 JL, 99-1527 JL, 99-4675 JL, at 13:12-13, filed Oct. 6, 2000.) The Ninth Circuit affirmed, see Knox 2001 WL 1664392, and the Supreme Court denied certiorari, see Knox 537 U.S. 887, and denied rehearing, see Knox 537 U.S. 1068. Thereafter, this Court dismissed Knox IV with prejudice. In each instance, the dismissal constituted a final

judgment on the merits. (See Huron Holding Co. v. Lincoln Mine Operating Co., 312 U.S. 183, 1189 (1941) (holding availability or pendency of appeal does not affect finality of federal judgments). Accordingly, all of Knox's prior complaints resulted in final judgments on the merits.

3. Identity of or Privity Between the Parties

Finally, and identity of, or privity between, the parties in the past and present cases must exist before the doctrine of res judicata will be said to apply to the present case. See Glickman, 123 F.3d at 1192. Generally, an employer-employee relationship will satisfy the privity requirements for matters within the scope of employment, irrespective of whether the employer or employee is sued first. See Spector v. El Ranco, Inc., 263 F.2d 143, 145 (1959); Lubrizol Corp. v. Exxon Corp., 871 F.2d 1279, 1288 (5th Cir. 1989) (holding vicarious liability relationship between [the

employer] and its employees... justifies claim preclusion").

Here, the postmaster general is named as a defendant in all of Knox's complaints. Lena is named as a defendant Knox I, Knox II, and Knox IV, and Ono and Labson are named as defendants in Knox IV. Consequently, the instant action involves the same parties as do one or more of Knox's previous actions. Under such circumstances, there exists an identity of, or privity between, the parties in the present action and the parties in Knox's previously adjudicated actions.

In sum, the instant action is barred by the doctrine of res judicata because there is an identity of claims, a final judgment on the merits, and identity or privity between the parties. See Western Radio Serv. Co. v. Glickman, 123 F.3d at 1192. Accordingly, defendants' motion to dismiss the instant action is GRANTED.

C. Failure to State a Claim Against Lena and Labson

Defendaants argue, in the alternative, that Lena and Labson must be dismissed because Knox fails to state a claim against these defendarts upon which relief can be granted. Specifically, defendants argue that the exclusive remedy for a plaintiff alleging employment discrimination on the basis of race and gender is Title VII, and that the exclusive remedy for a plaintiff alleging employment discrimination on the basis of age is the Age Discrimination in Employment Act ("ADEA"). Defendants argue that, under each statutory provision, the only proper defendant is the head of the agency employing the plaintiff. Consequently, defendants argue, Knox cannot state a claim under Title VII or the ADEA against Lena or Labson.

Title VII, specifically 42 U.S.C. 2000e-16, provides the exclusive remedy for a plaintiff alleging discrimination in federal employment on the basis of race and gender. See Brown v. Gen. Serv. Admin., 425

U.S. 820, 835 (1976). Section 2000e-16(c) provides that a federal employee "may file a civil action...in which Civil action the head of the department, agency, or unit, as appropriate, shall be the defendant." 42 U.S.C. 2000e-16(c). The Ninth Circuit has determined that "individual defendants cannot be held liable for damages under Title VII." See Miller v. Maxwell's Intern. Inc., 991 F.2d 583, 587 (9th Cir. 1993). In a suit alleging employment discrimination by the USPS, "[t]he Postmaster General is deemed the only appropriate defendant for such an action." See Mahoney v. United States Postal Service, 884 F.2d 1194, 1196 (9th Cir. 1989). Similarly, the ADEA provides the exclusive remedy for age discrimination in federal employment. See Valaris v. Army & Air Force Exchg. Svc., 577 F.Supp. 282, 285 (N.D. Cal. 1983). The Ninth Circuit has determined that the appropriate defendant in a suit arising under the ADEA is one who can properly be

named a defendant in a Title VII action. See Romain v. Shear, 799 F.2d 1415, 1418 (9th Cir. 1986).

Knox's causes of action are based on Knox's allegations that defendants discriminated against Knox on the basis of race, sex, and age. The exclusive remedies for discrimination based on race and sex is Title VII, under which the only appropriate defendant is Postmaster General Potter. See Brown, 425 U.S. at 835; Mahoney, 884 F.2d at 1196. The exclusive remedy for discrimination based on age is the ADEA, under which the only appropriate defendant is Postmaster General Potter. See Romain, 799 F.2d at 1418. Moreover, for the same reasons as expressed by Judge Larson in Knox I, Knox II, and Knox III, even if some of the instant claims could be construed as sounding in tort, and not "directly related to employment discrimination or retaliation," (see Order Granting Summary Judgment, Dismissing All Claims Against All

Defs., Case Nos. 98-0796 JL, 99-1527 JL, 99-4675 JL, at 7:4-20), they would be barred by the Federal Tort Claims Act for failure to exhaust administrative remedies as required under 28 U.S.C. 2671 et. seq. [16]

Accordingly, the instant complaint is DISMISSED as against defendants Lena and Labson for these reasons as well.

CONCLUSION

For the reasons set forth above, the motion of defendants Potter, Lena, and Labson to dismiss is hereby GRANTED, and the above-titled action is hereby DISMISSED with prejudice s against said defendants. Although Ono, as noted, has not joined in the motion and there is no indication that he has been served, the above analysis applies equally to Knox's claims against

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[16] As noted, the Ninth Circuit affirmed Judge Larson's decision, see Knox, 2001 WL 1664392, and the Supreme Court both denied certiorari, see Knox, 537 U.S. 887, and denied rehearing, see Knox, 537 U.S. 1068.

Ono. Accordingly, Knox's complaint against Ono likewise is DISMISSED with prejudice. See Silverton v. Dep't of the Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981) (holding district court "may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where claims against such defendants are integrally related".

The Clerk shall close the file.

IT IS SO ORDERED.

Dated: May 4, 2004

MAXINE M. CHESNEY
United States District Judge